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7 ERIC E. FLENTOIL,
8 Plaintiff,
9 v.
10 SANTA CLARA COUNTY DEPT. OF
11 CORRECTIONS,
12 Defendant.

Case No. [18-cv-03486-EMC](#)

ORDER OF SERVICE

Docket Nos. 1, 10, 11, 13, 20, 21

13 **I. INTRODUCTION**

14 Eric Flentoil, an inmate at the Santa Clara County Jail, filed a *pro se* civil rights complaint
15 seeking relief under 42 U.S.C. § 1983, and later filed two amended complaints. The most recent
16 amended complaint is now before the Court for review under 28 U.S.C. § 1915A. His two
17 requests for appointment of counsel and his request for an extension of the deadline to serve the
18 complaint also are before the Court for review.

19 **II. BACKGROUND**

20 In his most recent amended complaint (Docket No. 21¹), Mr. Flentoil alleges the
21 following:

22 Santa Clara Valley Health and Hospital System, Adult Custody Health Services
23 (SCVHHS-ACHS) provides medical care to inmates at the Santa Clara County Jail. Dr.
24 Alexander Chyorny was Mr. Flentoil's primary care physician at the jail, and also was the medical
25 director of the jail.

26 Mr. Flentoil suffered from a knee problem, i.e., a failed multiligamentous knee

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28 ¹ The most recent amended complaint (Docket No. 21) supersedes the original complaint (Docket
No. 1) and the amended complaint filed on July 5, 2018 (Docket No. 10).

1 reconstruction surgery, that predated his arrival at the Santa Clara County Jail.

2 Mr. Flentoil was booked into the Santa Clara County Jail on April 17, 2018. At that time,
3 he informed SCVHHS-ACHS staff of his knee problem and the need for appropriate
4 accommodation.

5 Mr. Flentoil requested crutches, a hinged knee brace, and an opioid pain medication that
6 had been prescribed by Dr. Vaughn, his outside doctor, a couple of weeks before his arrival at the
7 jail. Mr. Flentoil signed a release so that SCVHHS-ACHS could communicate with the outside
8 doctor to learn Mr. Flentoil's medical history; this "verification" took place in May 2018, but
9 crutches were not issued until June 20, 2018, even though Mr. Flentoil requested them repeatedly.
10 *Id.* at 2-3. Dr. Chyorny ignored the order of Dr. Vaughn, an outside specialist, when he failed to
11 provide the requested cutches, knee brace and medication. Dr. Chyorny also refused to treat Mr.
12 Flentoil's diabetic neuropathy with appropriate medication. Docket No. 21 at 3.

13 Although Mr. Flentoil was initially housed in the medical housing unit where there were
14 shower accommodations, he was moved to the general population where the shower area had no
15 ADA accommodations (such as guard rails, a shower chair, or slip-resistant flooring) that he
16 apparently needed for his knee problem. He complained to staff, and was told that he had been
17 cleared to return to general population. In May 2018, Mr. Flentoil submitted a request for medical
18 care as a result of slipping in the shower. He "was promptly re-housed appropriately" after he
19 filed a grievance on May 21, 2018 regarding the ADA accommodations. *Id.* at 4.

20 **III. DISCUSSION**

21 A. Review of Amended Complaint (Docket No. 21)

22 A federal court must engage in a preliminary screening of any case in which a prisoner
23 seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28
24 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any
25 claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or
26 seek monetary relief from a defendant who is immune from such relief. *See id.* at § 1915A(b).

27 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements: (1) that a
28 right secured by the Constitution or laws of the United States was violated and (2) that the

1 violation was committed by a person acting under the color of state law. *See West v. Atkins*, 487
2 U.S. 42, 48 (1988).

3 Medical Care Claim: Deliberate indifference to a pretrial detainee's serious medical needs
4 violates the Fourteenth Amendment's Due Process Clause. The deliberate indifference standard
5 that applies to a pretrial detainee's claim is an objective deliberate indifference test, rather than the
6 subjective deliberate indifference test applicable to a convicted prisoner's claim. *See Gordon v.*
7 *County of Orange*, 888 F.3d 1118, 1122 & n.4 (9th Cir. 2018).

8 Liberally construed, the amended complaint states a cognizable due process claim against
9 Dr. Chyorny for deliberate indifference to Mr. Flentoil's serious medical needs based on the
10 allegations that Dr. Chyorny failed to approve crutches and a hinged knee brace, and failed to
11 provide adequate medications to treat Mr. Flentoil's pain and diabetic neuropathy. (The Court
12 assumes that Mr. Flentoil was a pretrial detainee at the relevant time. If he was a convict, his
13 claim would arise under the Eighth Amendment's Cruel and Unusual Punishments Clause rather
14 than the Fourteenth Amendment's Due Process Clause.)

15 ADA Claim: Title II of the Americans With Disabilities Act, 42 U.S.C. § 12131 *et seq.*
16 (“ADA”), and § 504 of the Rehabilitation Act, as amended and codified in 29 U.S.C. § 701 *et seq.*
17 (“RA”), prohibit discrimination on the basis of a disability in the programs, services or activities
18 of a public entity. Federal regulations require a public entity to “make reasonable modifications in
19 policies, practices, or procedures when the modifications are necessary to avoid discrimination on
20 the basis of disability, unless the public entity can demonstrate that making the modifications
21 would fundamentally alter the nature of the service, program, or activity.” 28 C.F.R.
22 § 35.130(b)(7).

23 The elements of a cause of action under Title II of the ADA are: (1) the plaintiff is an
24 individual with a disability; (2) the plaintiff is otherwise qualified to participate in or receive the
25 benefit of some public entity's services, programs, or activities; (3) the plaintiff was either
26 excluded from participation in or denied the benefits of the public entity's services, programs or
27 activities, or was otherwise discriminated against by the public entity; and (4) such exclusion,
28 denial of benefits, or discrimination was by reason of the plaintiff's disability. *Thompson v. Davis*,

1 295 F.3d 890, 895 (9th Cir. 2002). A cause of action under § 504 of the RA essentially parallels
2 an ADA cause of action. *See Olmstead v. Zimring*, 527 U.S. 581, 590 (1999); *Duvall v. County of*
3 *Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001).

4 The proper defendant for a claim under Title II of the ADA and § 504 of the RA is the
5 public entity responsible for the alleged discrimination. *See Everson v. Leis*, 556 F.3d 484, 501 &
6 n.7 (6th Cir. 2009) (collecting cases). *But cf. Eason v. Clark County School Dist.*, 303 F.3d 1137,
7 1145 (9th Cir. 2002) (declining to decide the issue). Title II of the ADA does not provide for suit
8 against a public official acting in his individual capacity. *Everson*, 556 F.3d at 501. A plaintiff
9 also cannot assert a claim under § 1983 against defendants in their individual capacities to
10 vindicate rights created by the ADA and RA. *See Vinson v. Thomas*, 288 F.3d 1145, 1156 (9th
11 Cir. 2002).

12 Liberally construed, the amended complaint states a claim against the Santa Clara County
13 Department of Corrections for violations of Mr. Flentoil's rights under the ADA and RA based on
14 the allegations that he was not timely provided mobility assistive devices, and temporarily was
15 housed in general population where the shower area had no ADA accommodations (such as guard
16 rails, a shower chair, or slip-resistant flooring) that he needed due to his knee problem,

17 Although the amended complaint states cognizable claims against Santa Clara County
18 Department of Corrections under the ADA and RA, it does not state a § 1983 claim against this
19 municipal entity because there is no respondeat superior liability under section 1983, i.e. no
20 liability under the theory that one is liable simply because he employs a person who has violated a
21 plaintiff's rights. *See Monell v. Dep't of Social Servs.*, 436 U.S. 658, 691 (1978).

22 B. Miscellaneous Requests

23 Mr. Flentoil has requested that counsel be appointed to represent him in this action. A
24 district court has the discretion under 28 U.S.C. §1915(e)(1) to designate counsel to represent an
25 indigent civil litigant in exceptional circumstances. *See Wilborn v. Escalderon*, 789 F.2d 1328,
26 1331 (9th Cir. 1986). This requires an evaluation of both the likelihood of success on the merits
27 and the ability of the plaintiff to articulate his claims *pro se* in light of the complexity of the legal
28 issues involved. *See id.* Neither of these factors is dispositive and both must be viewed together

1 before deciding on a request for counsel under § 1915(e)(1). Exceptional circumstances are not
2 present in this action: Mr. Flentoil was able to articulate his claims adequately and there do not
3 appear to be complex issues involved. Mr. Flentoil's requests for appointment of counsel to
4 represent him in this action are DENIED. Docket No. 11 and 13.

5 Mr. Flentoil's request for an extension of time to serve the complaint is DENIED as
6 unnecessary. Docket No. 20. He is being granted *in forma pauperis* status by separate order filed
7 today. When a plaintiff is proceeding *in forma pauperis*, the U.S. Marshal tends to service of
8 process, and the plaintiff does not need to do so. Mr. Flentoil also does not need to prepare a
9 summons.

10 Mr. Flentoil has sent six letters, two motions for appointment of counsel, and multiple
11 pleadings in the three months that this case has been pending. He needs to be more patient and
12 more organized. The Court has numerous pending cases and generally will not act on a document
13 the day it is filed but rather will attend to the case in due course. Mr. Flentoil should take better
14 care of his papers, so that he will not need to repeatedly request copies of documents. He also
15 should take more care in preparing his filings; it unnecessarily consumes scarce judicial resources
16 when the Court must read multiple pleadings – here a complaint and two amended complaints –
17 filed in a short period of time that reflect hurried preparation. Finally, the Court notes that there
18 are many misstatements in Mr. Flentoil's miscellaneous filings. (Examples include his statement
19 in his motion for extension of time (Docket No. 20) that he already has been granted *in forma*
20 *pauperis* status and his statement under penalty of perjury in his declaration for entry of default
21 (Docket No. 15) that defendants were served with a summons and complaint on July 3, 2018.)
22 Mr. Flentoil must avoid making false statements in future filings.

23 **IV. CONCLUSION**

24 1. Plaintiff's motion to amend the complaint is GRANTED. Docket No. 21. The
25 amended complaint at Docket No. 21 is the operative pleading. The amended complaint, liberally
26 construed, states a cognizable § 1983 claim against Dr. Chyorny and cognizable ADA/RA claims
27 against the Santa Clara County Department of Corrections. All other claims are dismissed.

28 2. The Clerk shall issue a summons and the United States Marshal shall serve, without

1 prepayment of fees, the summons, a copy of the complaint and a copy of all the documents in the
2 case file upon the Santa Clara County Department of Corrections and Dr. Alexander Chyorny.

3 3. In order to expedite the resolution of this case, the following briefing schedule for
4 dispositive motions is set:

5 a. No later than **November 16, 2018**, Defendants must file and serve a motion
6 for summary judgment or other dispositive motion. If Defendants are of the opinion that this case
7 cannot be resolved by summary judgment, Defendants must so inform the Court prior to the date
8 the motion is due. If Defendants file a motion for summary judgment, Defendants must provide to
9 Plaintiff a new *Rand* notice regarding summary judgment procedures at the time they file such a
10 motion. *See Woods v. Carey*, 684 F.3d 934, 939 (9th Cir. 2012).

11 b. Plaintiff's opposition to the summary judgment or other dispositive motion
12 must be filed with the Court and served upon Defendants no later than **December 14, 2018**.
13 Plaintiff must bear in mind the notice and warning regarding summary judgment provided later in
14 this order as he prepares his opposition to any motion for summary judgment.

15 c. If Defendants wish to file a reply brief, the reply brief must be filed and
16 served no later than **December 28, 2018**.

17 4. Plaintiff is provided the following notices and warnings about the procedures for
18 motions for summary judgment:

19 The defendants may make a motion for summary judgment by
20 which they seek to have your case dismissed. A motion for
21 summary judgment under Rule 56 of the Federal Rules of Civil
22 Procedure will, if granted, end your case. . . . Rule 56 tells you what
23 you must do in order to oppose a motion for summary judgment.
24 Generally, summary judgment must be granted when there is no
25 genuine issue of material fact -- that is, if there is no real dispute
26 about any fact that would affect the result of your case, the party
27 who asked for summary judgment is entitled to judgment as a matter
28 of law, which will end your case. When a party you are suing
makes a motion for summary judgment that is properly supported by
declarations (or other sworn testimony), you cannot simply rely on
what your complaint says. Instead, you must set out specific facts in
declarations, depositions, answers to interrogatories, or
authenticated documents, as provided in Rule 56(e), that contradict
the facts shown in the defendants' declarations and documents and
show that there is a genuine issue of material fact for trial. If you do
not submit your own evidence in opposition, summary judgment, if
appropriate, may be entered against you. If summary judgment is

granted, your case will be dismissed and there will be no trial. *Rand v. Rowland*, 154 F.3d 952, 962-63 (9th Cir. 1998).

If Defendants file a motion for summary judgment for failure to exhaust administrative remedies, they are seeking to have the case dismissed. As with other defense summary judgment motions, if a motion for summary judgment for failure to exhaust administrative remedies is granted, Plaintiff's case will be dismissed and there will be no trial.

5. All communications by Plaintiff with the Court must be served on Defendants' counsel by mailing a true copy of the document to Defendants' counsel. The Court may disregard any document which a party files but fails to send a copy of to his opponent. Until a defendant's counsel has been designated, Plaintiff may mail a true copy of the document directly to the defendant, but once a defendant is represented by counsel, all documents must be mailed to counsel rather than directly to the party.

6. Discovery may be taken in accordance with the Federal Rules of Civil Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local Rule 16 is required before the parties may conduct discovery.

7. Plaintiff is responsible for prosecuting this case. Plaintiff must promptly keep the Court informed of any change of address and must comply with the Court's orders in a timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b). Plaintiff must file a notice of change of address in every pending case every time he is moved to a new facility.

8. Plaintiff is cautioned that he must include the case name and case number for this case on any document he submits to the Court for consideration in this case.

IT IS SO ORDERED.

Dated: September 18, 2018


EDWARD M. CHEN
United States District Judge